IN THE HIGH COURT OF BOMBAY AT GOA

Second Appeal No.39/2003

1. Shri Rohan A. Kerkar,

2. Shri Narayan alias Dada A. Kerkar,
both major of age,
resident of Deulwada, Keri,
Pernem, Goa. .... Appellants.

V/s.

1. Mrs. Joana De Souza (deceased)
a. Mr. Bazile de Souza, major of age,
business (son),

b. Mr. Zaferin D'Souza, major
of age, business (son),

c. Mr. Esparanca D'Souza,
major, (son),

d. Mr. Hilario Diogo D'Souza,
major (son),

e. Mr. Faustina D'Souza, major,
(son),

f. Mr. Mariano D'Souza, major,
(son)

g. Mr. Maria Jaquina D'Souza,
daughter-in-law)

h. Mrs. Anacleta D'Souza,
major, (daughter-in-law),

i. Mr. Augustin D'Souza,
major, (son),

j. Mrs. Fatima D'Souza, major,
(daughter-in-law),
all resident of Pawan wado,
Keri, Pednem, Goa.

k. Mrs. Felicidade D'Souza,
major, (daughter).
r/o. Maina, Korgao, Pedne, Goa. ..... Respondents.

Mr. J.P. Mulgaonkar, Advocate for the appellants.

CORAM : F.I. REBELLO, J.

DATE : JULY 25, 2003.

ORAL ORDER :

The appellants are the original defendants and the respondents are the original plaintiffs. The respondents herein had filed a suit against the appellants for permanent and mandatory injunctions and damages. It was the case of the respondents that there was a bund which the appellants started widening to make a road and it is in these circumstances that the suit came to be filed. The defence of the appellants was that towards the west of the suit property and adjoining the nallah, there is a 3 metres wide access road. Several issues were framed, of which Issue No.3 was, whether the appellants prove that the suit road is in existence as a customary right of way for over 22 years and issue No.4 was whether the appellants prove that the suit road was repaired by the Villagers, two years before the suit. Both these issues were answered in the negative. Issue No.1 as framed and burden of which was cast on the respondents, is whether the respondents prove that on 23.12.95, the appellants trespassed into the suit property on the western side and forcibly made a katcha road of 3 metres width. This issue was answered in the affirmative. The trial Court, therefore, partly decreed

the suit and restrained the appellants from interfering with the respondents' possession of the suit property and directed them to remove the stones, mud and other material dumped by them in the suit property and ordered restoration of land to its original position.

2. The appellants herein being aggrieved by the said Judgment and Order preferred an appeal. In the appeal, the learned First Appellate Court framed three points for determination, of which first was whether the respondent proved that she was in cultivatory possession of herself and her family. That was answered in the affirmative. Point (b) was whether the appellants herein proved that they trespassed into the suit property and dumped material in the suit property and converted the said strip of three metres into a katcha road without the consent of the respondent. That was answered in the affirmative. Point (c) was whether the appellants herein proved that towards the nallah, 3 metres wide road was in existence as customary right of way since last about 22 years. That was answered in the negative and consequently, the appeal was dismissed. It is this appeal, which is subject matter of the present second appeal. On behalf of the appellants, learned Counsel contends that there has been non-appreciation of the evidence of DW.2 and DW.3, the adjoining cultivators.

Both the Courts below have appreciated the evidence, including the report of the surveyor, who has deposed that the bund is required for protection of storm water entering the paddy fields. He did not depose about the existence of any road. So also the survey plan did not show any road. The evidence of DW.2 and DW.3 was considered by the learned trial Court, as can be seen from the findings recorded in para 25 of the Judgment. The reason given is that the evidence was not believable. The appellate Court has reappreciated the evidence. The appellate Court also recorded the finding in para 13 of its Judgment that the DW.3 cannot be relied upon. The evidence of DW. 3 was rejected, as his evidence was contrary to the pleadings of the defendants themselves. It is, therefore, not correct to say that there has been no consideration of the evidence of DW.2 and DW.3. In the light of that the appeal does not raise any substantial question of law and is merely appreciation of evidence. No interference is called for with the concurrent findings of the Courts below. Hence appeal rejected.

F.I. REBELLO, J.

ssm.